73-1021

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. .....

ISAAC STATES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

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ISAAC STATES,
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PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

Isaac States, Petitioner, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in this cause on December 5, 1973.

OPINIONS BELOW

The opinion of the court of appeals is not yet reported and is printed as Appendix A, *infra*. The opinion of the District Court is reported at 342 F. Supp. 1293 and is printed *infra*, as Appendix B.

JURISDICTION

The judgment of the Court of Appeals (Appendix C, *infra*) was entered on December 5, 1973. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the Mail Fraud Statutes, 18 U.S.C. 1341 and 1342, apply to depriving anyone of civil or political rights, as was the case here, where the indictment did not allege, and the evidence did not show, that anyone was defrauded, or intended to be defrauded, of any money or property.

STATUTES INVOLVED

Section 1341, Title 18, U. S. Code:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom

it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

Section 1342, Title 18, U.S.C.:

Whoever, for the purpose of conducting, promoting, or carrying on by means of the Post Office Department of the United States, any scheme or device mentioned in section 1341 of this title or any other unlawful business, uses or assumes, or requests to be addressed by, any fictitious, false, or assumed title, name, or address or name other than his own proper name, or takes or receives from any post office or authorized depository of mail matter, any letter, postal card, package, or other mail matter addressed to any such fictitious, false, or assumed title, name, or address, or name other than his own proper name, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

STATEMENT

Count one of the 137 Counts Indictment charged the several defendants with conspiracy to violate Section 1341 and Section 1342 of Title 18, U.S.C. in violation of Section 371, Title 18, U.S.C. There was no allegation that the defendants conspired to defraud the United States in violation of Section 371, but only conspired to violate the above mentioned mail fraud statutes. Petitioner was charged in 42 counts.

Each of the other counts charges that the defendants devised and participated in a scheme to defraud the City of St. Louis Election Commissioners and the voters and residents of the 3rd and 19th Wards of the City of St. Louis by use of fraudulent voter registrations or applications for absentee ballots. There is no allegation that anyone was defrauded out of any money or property or anything of money or property value. Indeed, the indictment is clear that what is alleged is that the defendants devised a scheme to stuff election ballots. There was no allegation that the defendants carried out the scheme to the extent that any fraudulent ballots were voted.

The Petitioner filed the following motion to dismiss the indictment:

> "Defendant States moves to dismiss the indictment in that each and every count thereof fails to state an offense against the United States in that there is no allegation in any count that anyone was defrauded out of any money or property or anything of money or property value and the mail fraud statutes (18 U.S.C. 1341 and 1342) do not apply to defrauding anyone of mere civil or political rights."

In overruling the motion, District Judge Webster stated the facts in his memorandum as follows:

> "The defendants stand indicted of mail fraud in violation of 18 U.S.C. §§ 1341 and 1342 and conspiracy in

violation of 18 U.S.C. § 371. The indictment charges that the defendants devised a scheme to defraud the voters and residents of the third and nineteenth wards of the City of St. Louis and the Board of Election Commissioners of the City of St. Louis by the use of fraudulent voter registrations and applications for absentee ballots. It is alleged that the purpose of the scheme to defraud was to influence the outcome of the election of the Republican Committeeman for the nineteenth ward and the Democratic Committeeman for the third ward 'for the purpose of securing and controlling said political offices and the political influence and financial benefits of said offices * * *'.[1] It is further alleged that as part of the scheme to defraud, the defendants submitted false and fraudulent voter registration affidavits bearing the names of false and fictitious persons with false addresses and caused the St. Louis Board of Election Commissioners to place absentee ballots for the fictitious persons in an authorized depository for mail matter.

Count One charges a conspiracy to commit an offense in violation of 18 U.S.C. § 1341 and 18 U.S.C. § 1342, which is an offense under 18 U.S.C. § 371. The remaining 136 counts charge substantive violations of either § 1341 or § 1342. The conspiracy count does not rely upon the clause in § 371 which makes it an offense to conspire to defraud the United States. Thus, all of the counts of the indictment have one common and essential element with respect to the offense alleged in each count: the devising of a scheme or artifice to defraud. If the scheme alleged to cause false and fraudulent absentee ballots to be counted in a primary election in order to control the offices of two ward committeemen—is not a 'scheme or artifice to defraud' within the meaning of 18 U.S.C. § 1341, then the government will have failed to state an offense

[1] Committeemen are not paid any salary.

under any of the counts of the indictment, and the indictment must be dismissed."

The Court of Appeals stated in note 2, "Thus, if there is no offense under § 1341, the indictment is totally defective."

The evidence adduced at the trial may be briefly summarized as follows:

The defendant Morgan was the Republican Committeeman for the 19th Ward, which was populated almost exclusively by colored citizens, a position he had held for many years. Due to redistricting, his residence was removed from the ward and his name was removed from the ballot for the primary 1972 election (Tr. 225-230). Since there were very few Republican voters in the Ward (total of 154), he undertook a "write-in" campaign for reelection as Republican Committeeman. (pl. Ex. 192, Tr. 235). The winner received 641 votes and Mr. Morgan got 14.

It was the policy of the St. Louis City Election Board to employ all temporary clerks at the Board around election time from persons recommended by the Committeemen, Republican clerks by Republican Committeemen, and Democratic clerks by Democratic Committeemen, (Tr. 123-8, 137-140, 149). Mr. Glennon Bradford had for several years served as a clerk, intermittently, at the Board and was familiar with its personnel and operations. He had also worked in Mr. Morgan's campaign since 1965. (Tr. 204-5). He undertook to operate a campaign for Mr. Morgan by filing false registrations of non-existent voters (referred to as Registration affidavits) with the Board which would be voted either at election day at the various precinct polls or by absentee ballots. (Tr. 342-636).

Petitioner States, who had no previous political experience, had filed for Democratic Committeeman for the 3rd Ward, also a colored ward. The total democratic vote was 1732. (pl. Ex. 191, TR. 225, 235). He was invited into the scheme, particu-

larly for financial aid, to receive some aid in his campaign. The winner received 1139 votes and Mr. States got 144. (ibid). In this endeavor, he paid Mr. Bradford about $1,000.00 to $1,600.00.

Mr. Bradford secured the employment, upon the recommendation of Mr. Morgan and other Republican Committeemen, of several Republican clerks at the committee. He also obtained the assistance of one Democratic clerk. (Tr. 123-125, 198-203, 222-4, 139). Hundreds of Registration Affidavits were forged at Mr. Morgan's campaign headquarters (Tr. 383), supervised by Mr. Bradford, signed there by the Republican clerks so employed. Usually a Democratic clerk's signature was forged. Mr. States also obtained some signatures on such Registration Affidavits, which were given to Bradford for obtaining clerk's signatures and filing. (Tr. 309-20, 173, 272, 297). These were given to Mr. Booker, one such temporary Republican clerk for filing at the Board. However, Mr. Booker never filed them. A few such forged Registration Affidavits were filed at the Board, but the evidence does not disclose by whom. (Tr. 136-140, 144-46, 404-413).

Also, applications for 21 Republican Absentee ballots were filed at the Board by Booker, to be mailed to two addresses, seven to 2120 East Prairie and 14 to 3864 Ashland. Each of these ballots were alleged as four counts in the indictment (Counts 2 through 81). (Tr. 408). These ballots were directly or indirectly received by defendant States. States gave them to Bradford, but he never mailed them in for voting (Tr. 29-57, 123-126).

Seventy-six applications for Democratic absentee ballots was filed at the Board by Booker (Tr. 408), to be mailed at two addresses at Morgan's headquarters, 721 North Beaumont and 2700 Delmar. The Postal Service refused to deliver them.[2]

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[2] Each of these ballots were alleged as two counts in the indictment (Counts 82 through 137).

This action apparently frustrated the plans and no fraudulent votes were actually voted.[3] (Tr. 11-29, 95-123, 127-131, 177-8, 189, 242, 243, 342-636.).

The 42 counts charging petitioner involved 21 absentee ballots which were never mailed back for voting. The case was tried before the Honorable William H. Webster, without a jury. He was found guilty on all counts and sentenced to 5 years imprisonment.

All the defendants were acquitted, except those three who were shown to have done something directly with the absentee ballots which were sent to the addresses indicated above, through the mails. The false Registration Affidavits were never mailed and those defendants who forged them, but were not shown to have worked on the absentee ballots, were acquitted.

The majority opinion of the Court of Appeals held that the Mail Fraud statutes extend to and prohibit any misuse of the Postal Service. Judge Ross, concurring, stated as follows:

> "I reluctantly concur. The law, as capably expressed by Judge Matthes, leaves us no other alternative.
>
> However, I cannot believe that it was the original intent of Congress that the Federal Government should take over the prosecution of every state crime involving fraud just because the mails have been used in furtherance of that crime. The facts in this case show that this election fraud was purely a state matter. It should have been prosecuted in state court. The Assistant United States Attorney conceded in oral argument that the case was not the type of mail fraud case covered by written instructions contained in the United States Attorneys' manual. In spite of this, the decision was made by the

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[3] Bradford testified, however, that he never from the outset intended to go through with the plan. (Tr. 546).

United States Attorney to prosecute the case without asking or receiving the approval of the Department of Justice. In so doing, he relieved the state of its duty to police the violation of its local election laws and helped create a precedent which will encourage the same sort of unwarranted federal preemption in the future."

REASONS FOR GRANTING THE WRIT

An important question of general applicability affecting the administration of criminal justice in the Federal Courts is presented here which has never heretofore been decided by this Court or any other court of Appeals. An examination of the majority opinion and the cases cited therein will show that all of the appellant decisions heretofore decided involved money or property rights and none extended to the protection of civil rights, either state or Federal.

As Judge Ross pointed out, the United States Attorney did not ask or receive the approval of the Department of Justice for this prosecution. The prosecution may have been brought by the United States Attorney under the Mail Fraud statutes because he was fearful that the Department of Justice would not approve it if the required request were made under the election laws (18 U.S.C. 591-612) or the Civil Rights laws (18 U.S.C. 241-245). Indeed, one of the civil rights statutes (18 U.S.C. 245) requires the approval of the Attorney General before a prosecution can be initiated.

We submit that these civil rights statutes (18 U.S.C. 241-245) as well as the statutes on elections (18 U.S.C. 591-612) show that Congress did not intend that the Federal Government take over the policing of State elections by Mail Fraud. Further, if this conviction is allowed to stand, it will be necessary, as the majority opinion below concedes, to give the Mail Fraud statute the broad interpretation which has been given to Section 371,

Title 18, U.S.C. which would then give the Federal Government criminal jurisdiction over any deprivation, obstruction or impairment of any State agency, as the mails are almost always used in any scheme. We believe the long history of the Mail Fraud statute without such extension dictates against such sweeping broadening of the Mail Fraud statutes now.

Not only have the courts not heretofore done this, but the language of Section 371 is much broader than that of Section 1341.

The language of the mail fraud statutes differs from the language of Section 371, where the latter concerns defrauding the United States. Section 371 reads as follows in pertinent part:

> "If two or more persons conspire either to commit any offense against the United States, **or to defraud the United States, or any agency thereof in any manner or for any purpose,** * * *"

But Section 1341 reads as follows in pertinent part:

> "Whoever, **having devised** or intending to devise **any scheme or artifice to defraud,** or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * *"

Section 1342 incorporates the fraud provisions of Section 1341.

The broader language of Section 371 (formerly Section 37) has been expanded far beyond common law fraud. See **Conspiracy to Defraud the United States,** Professor Abraham S. Goldstein, 68 Yale Law Journal 405-463 (1959),[4] which thor-

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[4] Note 43, at page 420 states: "Cheats as common law crimes are described in Hall, Theft, Law and Society 10 (1935). In the seventeenth century, a cheat was defined as "the fraudulent obtaining the property of another, by any deceitful or illegal practice or token . . . which affects or may affect the public."

oughly recounts this development in the case law concerning Section 371. After many lower court decisions in this direction reviewed by Professor Goldstein, the Supreme Court ruled in **Haas v. Henkel,** 216 U.S. 462, 479, 54 L. ed 569, 577 (1909):

> "The authority for the indictment charging a conspiracy to defraud is Section 5440, Rev. Stat. (U.S. Comp. Stat. 1901, p. 3676). Its language is plain and broad:
>
> 'If two or more persons conspire . . . to defraud the United States in any manner or for any purpose . . .'
>
> "These counts do not expressly charge that the conspiracy included any direct pecuniary loss to the United States . . . The statute is broad enough in its terms to include any conspiracy for the purpose of impairing, obstructing, or defeating the lawful function of any department of government."

Although, as Professor Goldstein points out ('68 Yale Law Journal at 428-430), there were temporary retreats from this broad interpretation of Section 371 in **United States v. Gradwell,** 243 U.S. 476 (1917), and **Hammerschmidt v. United States,** 265 U.S. 182 (1924), the broad interpretation of the language in Section 371 (which is much broader than that in the mail fraud statutes) has been consistently followed and recently reaffirmed by the Supreme Court in **Dennis v. United States,** 384 U.S. 855, 861, 16 L. ed 2d 973, 974 (1966):

> "Nor can it be concluded that a conspiracy of the described nature and objective is outside the condemnation of the specific clause of Section 371 relied upon in the indictment, which charges a conspiracy 'to defraud the United States, or any agency thereof in any manner or for any purpose.' It has long been established that this statutory language is not confined to fraud as that term has been defined in the Common Law. It reaches 'any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of Government' (citing cases and the above mentioned article)."

However, this development concerning the broader language of Section 371, has not occurred with respect to the narrower language of the Mail Fraud statutes, to wit, "scheme to defraud." The subject that in the hundreds of reported decisions involving the mail fraud statutes, neither this writer nor Government counsel, nor the court below, found any decisions which did not involve actual or potential pecuniary or proprietary or property loss, save two District Court decisions which reached opposite conclusions, to wit, **United States v. Randle** (W.D. La. 1941), 39 F. Supp. 759, and **United States v. Classic,** 35 F. Supp. 457 (E.D. La. 1940), each involving dilution of the ballot. Other cases cited by the Court below each concerned money, property or proprietary rights.

To be sure, no other Appellate Court has ever decided the issue, apparently because the Government has not followed the practice of charging persons with Mail Fraud where the alleged fraud is non-pecuniary, but is in fact deprivation of civil rights (as here) or impairing, obstructing or defeating the lawful functions of any department of State Government. Typical language running through many of the mail fraud cases is that found in **United States v. Lynn,** 10 Cir., 461 F. 2d 759, 762 (1970): "The gist of the offense of mail fraud lies in the use of the mails to obtain money or property by fraudulent means." Professor Goldstein pointed out in Note 174, 68 Yale Law Journal at 458, that the courts had adhered to the pecuniary or proprietary base of fraud in statutes with narrower language than Section 371, referring, *inter alia,* to **Randle,** *supra.*

There is, as pointed out in the opinions below, some broad *dicta* in some mail fraud cases, but an examination of each of those cases, will show that the scheme under consideration did involve pecuniary or property loss.

We submit that there is no merit in the distinction made by the courts below between the first and second disjunctive clauses

of Section 1341. The second clause was added to the Mail Fraud statute to make sure it covered cheats by misrepresentation (as well as those that did not involve misrepresentations). See **Hormon v. United States,** 116 Fed. 350, and **Hammerschmidt v. United States,** 265 U.S. 182. On the contrary, we believe the adding of the second clause referring to money and property indicates an legislative intent that the first clause was limited to cheats of money and property without use of misrepresentations.

Before this case there is no real authority to base a ruling either for or against the petitioner. But if mail fraud is extended to the deprivation of **State** civil rights, it will open up a large new area of Federal Criminal jurisdiction where, as Judge Ross stated, there is no evidence that Congress intended. Of course, we agree that if Congress chose to do so, it could extend mail fraud to the deprivation of State civil rights, but Congress has never undertook to extend Federal Criminal Laws as far as the constitution permits. See **Kahn v. United States,** 89 L. ed. 88, 96, 323 U. S. 88, 95. And, we can all think of familiar instances of great limitations, such as the statutes on interstate transportation of stolen property to $5,000 or more, and the anti-racketeering statutes (18 U.S.C. 1511, 1952, 1961).

Indeed, Congress has adopted extensive statutes protecting the deprivation of civil rights guaranteed by the Federal laws or the United States Constitution. 18 U.S.C. 241-245.

There have been Federal civil rights statutes ever since the end of the Civil War (formerly Section 19), under which election frauds and ballot stuffing affecting Federal elections have been prosecuted, as well as being prosecuted under Section 371 (formerly Section 37). **United States v. Saylor,** 322 U.S. 385, 64 S. Ct. 1101 (1944); **Ledford v. United States,** 155 F. 2d 574 (6 Cir. 1946); **United States v. Wilson,** 72 F. Supp. 812 (W.D. Mo. 1947); **United States v. Classic,** 313 U.S. 299; **Ex**

Parte Yarborough, 110 U.S. 651; **United States v. Mosley,** 238 U.S. 383. See also, **United States v. Gradwell,** 243 U.S. 476; **United States v. Bathgate,** 246 U.S. 220.

We submit that these civil rights statutes as well as the statutes on elections (18 U.S.C. 591-612) show that Congress did not intend that the Federal Government take over the policing of State elections. Further, if this conviction is sustained, it would be necessary to give the Mail Fraud statute the broad interpretation of Section 371, which would then give the Federal Government criminal jurisdiction over any deprivation, obstruction or impairment of any State agency, as the mails are almost always used in any scheme. We believe the long history of the Mail Fraud statute without such extension dictates against such sweeping broadening of the Mail Fraud statutes now.

We now turn to the two District Court cases, **United States v. Randle,** supra, 39 F. Supp. 759; and **United States v. Classic,** *supra*, 35 F. Supp. 456. We concede that neither case is of much authoritative or logical aid to this Court. The District Judge in **Classic** gave no authority for his memorandum decision in overruling a Motion to Dismiss counts 5 and 6 of the Indictment, dealing with mail fraud. There is no further reported history of those counts of the case. On October 9, 1940[5] the District Judge dismissed the first four counts of the indictment, which were founded on this civil rights statutes. **United States v. Classic,** 35 F.Supp. 66. He was clearly wrong as it involved a Federal election, and the Government appealed the dismissal to the Supreme Court, which court reversed. **United States v. Classic,** 313 U.S. 299 (1941).

The Supreme Court decision in no way concerned the Mail Fraud statutes. Since there were no further appeals, and the

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[5] Twenty-two days later, the same Judge ruled the mail fraud counts were valid, 35 F. Sup. 456. This was not an appealable decision.

Supreme Court had sustained the validity of the four civil rights counts of the indictment, the case was apparently finally disposed of in some manner in the District Court.

In **Randle,** it was charged that the defendants in violation of 18 U.S.C. 338, the forerunner of 18 U.S.C. 1341, devised a scheme to defraud by making false election returns in a state primary, spoiling and incorrectly counting ballots and using the mails as part of that scheme. The court sustained a demurrer to the indictment, holding:

> "[I]t must be shown by the alleged scheme that the persons to be defrauded were or could have been deprived of moneys or property of some value other than mere civil or political rights.
>
> * * * * * * *
>
> "The sovereign and public generally have no property right in the selection of officers or which it or they may be deprived by misconduct, even in general elections."

In reaching this decision, the Court cited **United States v. Gradwell,** 243 U.S. 476 (1917); **United States v. Bathgate,** 246 U.S. 222 (1918); and **Hammerschmidt v. United States,** 265 U.S. 182.

Gradwell involved the forerunner of broader Section 371 (then Section 37), and the civil rights statute (then Section 19). The civil rights statute was held at that time not to apply to primary elections, which was later changed. See **United States v. Classic,** *supra,* 313 U.S. 299. As we have noted previously, this case is one where the Supreme Court temporarily retreated from its very broad interpretation of the broad language of Section 371. But certainly if the broad language of Section 371 does not apply to diluting the ballot box in a Federal election, the narrower language of the Mail Fraud statute does not apply to such conduct, either in Federal or State elections.

In **Bathgate,** also involving a Federal election, the Government abandoned the count under broader Section 371 (then Section 37), because of the recent decision in **Gradwell,** and the civil rights statute (then Section 19) was held not to apply to bribery.

Hammerschmidt involved Section 371 (then Section 37) with its broader fraud language. We have noted previously that in this case there was a retreat in the broad interpretation of the much broader language of Section 371.

The decision below is the first appellate decision as to whether the Mail Fraud statutes extend beyond defrauding of money or property rights to the deprivation of civil rights. This fact alone indicates the hesitation of the Government, in view of the statute's long history, to assert that it covers such conduct. We believe it is a late date for so extending the Mail Fraud statutes without further legislative action; and, that all the defendants should have been left to State prosecution, as Judge Webster referred the acquitted defendants. (Tr. 810-815, 818-19).

CONCLUSION

For the reasons stated above, we respectfully submit that the petition should be granted.

Respectfully submitted

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APPENDIX A

United States Court of Appeals
For the Eighth Circuit

United States of America,
Appellee,
v.
Isaac States,
Appellant, No. 73-1253,

United States of America,
Appellee,
v.
Michael McCoy,
Appellant, No. 73-1214,

United States of America,
Appellee,
v.
Robert Morgan,
Appellant, No. 73-1244.

Appeals from the United States District Court for the Eastern District of Missouri.

Submitted: September 13, 1973
Filed: December 5, 1973

Before Matthes, Senior Circuit Judge, Lay and Ross, Circuit Judges.

Matthes, Senior Circuit Judge.

A multiple count indictment charged appellants with mail fraud in violation of 18 U.S.C. §§ 1341 and 1342, and with con-

spiracy to commit mail fraud in violation of 18 U.S.C. § 371.[1] Their separate appeals have been consolidated for the purpose of argument and opinion.

Before trial appellants moved to dismiss the indictment asserting that it failed to allege that anyone had been defrauded of any money or property, and consequently failed to state an offense against the United States. The court denied the motions to dismiss and filed a memorandum opinion setting forth in detail the legal basis for sustaining the validity of the indictment. **United States v. States**, 362 F. Supp. 1293 (E.D. Mo. 1973).

The appellants waived a jury and a bench trial resulted in their convictions. Their appeals challenge the court's action in entertaining the charge.

The indictment is lengthy. In addition to the conspiracy charge and the overt acts alleged in connection therewith, which is the subject of count one, there are 136 counts alleging substantive violations of either section 1341 or section 1342. Each substantive count was based upon the use of the mails for the purpose of executing the fraudulent scheme concocted by the parties to the conspiracy.[2]

Recognizing that the elements of the scheme or artifice to defraud are the heart of appellants' case, we review briefly the

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[1] In addition to appellants, six other persons were named as defendants and conspirators, and three unindicted persons were named as co-conspirators. Two of the other defendants pleaded guilty and four were acquitted.

[2] 18 U.S.C. § 1341 prescribes certain punishments for whomever uses the Postal Service for the purpose of executing "any scheme or artifice to defraud." 18 U.S.C. § 1342 proscribes the use of any fictitious name or address for the purpose of carrying out any scheme mentioned in § 1341. 18 U.S.C. § 371 makes unlawful any conspiracy to "commit an offense against the United States"; in this instance, mail fraud. Thus, if there is no offense under § 1341, the indictment is fatally defective.

pertinent parts of the indictment and, in so doing, adopt the language of the district court set forth on page 1294 of 362 F. Supp.

> The indictment charges that the defendants devised a scheme to defraud the voters and residents of the third and nineteenth wards of the City of St. Louis and the Board of Election Commissioners of the City of St. Louis by the use of fraudulent voter registrations and applications for absentee ballots. It is alleged that the purpose of the scheme to defraud was to influence the outcome of the election of the Republican Committeeman for the nineteenth ward and the Democratic Committeeman for the third ward "for the purpose of securing and controlling said political offices and the political influence and financial benefits of said offices * * *."
>
> It is further alleged that as part of the scheme to defraud, the defendants submitted false and fraudulent voter registration affidavits bearing the names of false and fictitious persons with false addresses and caused the St. Louis Board of Election Commissioners to place absentee ballots for the fictitious persons in an authorized depository for mail matter.

The evidence conclusively supported the fraudulent scheme as framed in the indictment. A summary of that evidence will serve to place the issue in controversy in proper perspective.

Appellant Isaac States was a candidate in 1972 for the office of Democratic Committeeman from the third ward in the City of St. Louis, and Robert Morgan was a candidate for Republican Committeeman from the nineteenth ward in the same city. Morgan entered into a scheme with his campaign manager to falsify voter registration affidavits in order to carry out an extensive write-in campaign for Morgan. Morgan obtained blank affidavits, and campaign workers began filling in

the affidavits with fictitious names and addresses. A few days later, States was invited to join the operation in order to benefit his own campaign, and he agreed.

Appellants Morgan and States then devised a more elaborate aspect of the scheme, in which they applied for absentee ballots in the names of the phantom voters whose names appeared on the falsified voter registration affidavits. The absentee ballot operation eliminated the necessity of sending persons to the polls to vote under the fictitious names on the falsified registration affidavits, since the absentee ballots would be mailed by the Board of Election Commissioners to the nonexistent voters. A mailing address accessible to the appellants was listed on each absentee ballot application. The appellants planned to retrieve the ballots, mark them, and then return them to the election board for counting.

Appellant Michael McCoy was involved in filling out the applications for absentee ballots in the names of the nonexistent voters, as well as preparing the falsified voter registration affidavits. Each application stated that it was a violation of state law to improperly complete an application, and advised the applicant that the absentee ballot would be sent to him by registered mail.

The Board of Election Commissioners mailed numerous absentee ballots to nonexistent voters as a result of the appellants' scheme: twenty-one were actually delivered by the Postal Service, and others were held by the Service because the route mail carrier knew that the person named on the envelope containing the ballot did not live at the address indicated. The action of the Postal Service foiled the operation, and the appellants were subsequently indicted.

At the outset of their claim for reversal the appellants submit that the very language of 18 U.S.C. § 1341 mandates a

holding that there is an offense under the statute only if money or property is involved in the scheme to defraud. Appellants argue that the first phrase of § 1341, dealing with "any scheme or artifice to defraud," must be read in conjunction with the second phrase, concerning "obtaining money or property by means of false or fraudulent pretenses, representations, or promises," which was added to the statute by a subsequent amendment.[3] Appellants suggest that the second phrase was added to the predecessor of § 1341 because Congress believed that the "scheme to defraud" language included only frauds perpetrated without misrepresentations. They argue that the explicit "money or property" limitation in the added passage reveals that Congress believed that the first phrase in the original legislation dealt only with schemes to defraud of money or property.

But no case or legislative history is cited by the appellants supporting such an interpretation of legislative intent, nor does there appear to be any authority justifying such a construction of the statute. Moreover, not only does the appellants' conjunctive construction of the two phrases place a very strained and

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[3] 18 U.S.C. § 1341, as amended, now reads:

§ 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting to do so, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

limited meaning on the broad wording of the first phrase, but a reading of the statute as a whole reveals that the two phrases in question are part of an uninterrupted listing of a series of obviously diverse schemes which result in criminal sanctions if the mails are used.

The more natural construction of the wording in the statute is to view the two phrases independently, rather than complementary of one another. Indeed, numerous courts have construed the "scheme or artifice to defraud" language of § 1341 without reference to the "obtaining money or property" phrase. **See, United States v. Classic,** 35 F. Supp. 457 (E.D. La. 1940); **cf. United States v. Regent Office Supply Co.,** 421 F.2d 1174 (2d Cir. 1970); **Blachly v. United States,** 380 F.2d 665 (5th Cir. 1967); **Abbott v. United States,** 239 F.2d 310 (5th Cir. 1956).

Consequently, we hold that the language of the statute on its face does not preclude a finding that a "scheme or artifice to defraud" need not concern money or property. Since the statutory wording itself does not conclusively resolve the issue presented by the appellants, and since the legislative history does not deal with the scope and meaning of the provision of the statute in issue, we examine judicial opinions construing § 1341 for assistance in definitely determining whether the statute should apply to the facts of this case.

Initially, it should be noted that the concept of fraud in § 1341 is to be construed very broadly. **Durland v. United States,** 161 U.S. 306 (1896); **Shushan v. United States,** 117 F. 2d 110, 115 (5th Cir.), **cert. denied,** 313 U.S. 574 (1941); **Gouled v. United States,** 273 F. 506, 508 (2d Cir. 1921), where the court stated: "As it now stands, any kind or species of scheme or artifice to defraud is punishable in the national courts, if and whenever for the purpose of executing that scheme the postal establishment is used. * * *"; **United States**

v. Proctor & Gamble Co., 47 F. Supp. 676, 678 (D. Mass. 1942). In **Blashly v. United States**, *supra*, the court observed:

> The crime of mail fraud is broad in scope * * * The fraudulent aspect of the scheme to "defraud" is measured by a nontechnical standard * * * Law puts its imprimatur on the accepted moral standards and condemns conduct which fails to match the "reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of the members of society." This is indeed broad. For as Judge Holmes once observed "[t]he law does not define fraud; it needs no definition. It is as old as falsehood and as versable as human ingenuity."

380 F.2d at 671.

Likewise, the definition of fraud in § 1341 is to be broadly and liberally construed to further the purpose of the statute; namely, to prohibit the misuse of the mails to further fraudulent enterprises. **Cf. Durland v. United States**, *supra*. Accordingly, many courts have construed the term "scheme or artifice to defraud" to include within its ambit widely diverse schemes. **See United States v. Edwards**, 458 F.2d 875 (5th Cir.), **cert. denied**, 409 U.S. 1029 (1972) (divorce mill granting decrees of questionable validity); **Shushan v. United States**, *supra* (bribery of public officials); **Abbott v. United States**, *supra* (bribery of oil company employee to gain company's geophysical maps); **Horman v. United States**, 116 F. 350 (6th Cir.), **cert. denied**, 187 U.S. 641 (1902) (mailing of extortion note under predecessor to § 1341); **United States v. Classic**, *supra* (ballot tampering by election officials).

Here, we have a scheme by the appellants to deceive and defraud the public and the Board of Election Commissioners of certain intangible political and civil rights. Although few courts have considered whether vote fraud schemes using the Postal Service are included within the mail fraud statute, **United**

States v. Classic, *supra*, is one such case decided on that issue. In **Classic**, the defendant election officials used the mails in the course of a scheme to change and alter ballots to read in favor of the eventually successful candidate. The district court overruled a demurrer to two mail counts in the indictment against the officials, stating:

> The mail fraud statute denounces **the use of the mails**, in the actual, or attempted, execution of **any** devised scheme **or** artifice to defraud, **or** for obtaining money or property by means of false or fraudulent pretences, representations or promises * * *.

35 F. Supp. at 458 (emphasis in original).

Another district court case, **United States v. Randle**, 39 F. Supp. 759 (W.D. La. 1941), relied upon by appellants, held that the mail fraud statute could not be applied in an election fraud case because neither the voters nor the sovereign had been defrauded of money or property. The court's opinion in **Randle**, however, appears to reflect a misunderstanding of the statutory basis for the indictment involved in that case, for two of the three cases cited by the **Randle** court dealt with a federal court's lack of statutory authority to prosecute in voter bribery cases under a statute making it a substantive offense to oppress citizens in the exercise of rights granted by the Constitution or laws of the United States. See **United States v. Bathgate**, 246 U.S. 223 (1918); **United States v. Gradwell**, 243 U.S. 476 (1917). **Gradwell** also held that the conspiracy to bribe voters was not a "conspiracy to defraud the United States" under a predecessor to 18 U.S.C. § 371, a provision different from the mail fraud statute involved in **Randle** and in our case. The third opinion cited by **Randle, United States v. Hammerschmidt**, 265 U.S. 182 (1924), also was prosecuted under a predecessor to § 371. Although the **Hammerschmidt** decision mentioned the mail fraud statute in dictum, it stated

that an earlier circuit court of appeals case[4] had held that there need not be a finding of "trickery or cunning" for the conduct to be included within the language of the mail fraud statute, and that the holding in **Horman** should be limited to cases involving fraud of money or property.[5] In the instant case, it is obvious that "trickery or cunning" was involved in the scheme to falsify voter registration affidavits.

Thus we agree with the district court that neither **United States v. Randle** nor the decisions cited by that opinion serve as authority for the proposition that only schemes using the mails to defraud the victim of property or money can be brought within the ambit of 18 U.S.C. § 1341.

There are also cases concerning bribery schemes which supports the view that money or tangible property need not be involved in the scheme to defraud in order for the mail fraud statute to be invoked. Beginning with **Shushan v. United States,** *supra,* the Fifth Circuit has included within the term "scheme or artifice to defraud" an operation to bribe and corrupt public officials in order to gain advantages and special treatment. **See also Steiner v. United States,** 134 F.2d 931 (5th Cir.), **cert. denied,** 319 U.S. 774 (1943); **Bradford v. United States,** 129 F.2d 274 (5th Cir.), **cert. denied,** 317 U.S. 683 (1942). In **Shushan** there is the implication that a scheme to gain personal favors from public officials is a scheme to defraud the public, although the interest lost by the public can be described no more concretely than as an intangible right to the proper and honest

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[4] **Horman v. United States,** 116 F. 350 (6th Cir.), **cert. denied,** 187 U.S. 641 (1902).

[5] Indeed, the suggestion in **Hammerschmidt** that the holding of **Horman** should be "confined" to those cases that deal with money or property fraud raises the implication that the Supreme Court recognized that the mail fraud statute covered a wider range of conduct than was at issue in **Horman;** namely, frauds not involving money or property as well as those that did. **See** 265 U.S. at 188-89.

administration of government. "* * * There must be a purpose to do wrong which is inconsistent with moral uprightness." See 117 F.2d at 115. This concept, that a scheme to defraud of certain intangible rights is grounds for prosecution under § 1341 if the mails are used, is more explicitly stated in **United States v. Faser**, 303 F. Supp. 380 (E.D. La. 1969). In **Faser**, the defendants were indicted under the mail fraud statute after they accepted bribes to deposit public funds in a certain bank. There, as here, the defendants contended the indictment failed to state an offense because it did not allege that someone was actually defrauded out of something tangible that can be measured in terms of money or property. In rejecting that argument the court specifically discussed whether a fraudulent scheme must entail money or property in order for there to be an offense under § 1341. As an alternative ground for overruling the motion to dismiss, the court stated:

> [I]t is further the opinion of this Court that the thing out of which it is charged that the State was defrauded need not necessarily be that which can be measured in terms of money or property. It is the opinion of this Court that it is a violation of the statute in question if a person defrauds the State out of the "loyal and faithful services of an employee." * * *
>
> Thus it seems quite clear that even if the thing out of which the State was allegedly defrauded was not susceptible of measurement in terms of money or physical property, a valid indictment may still result therefrom.

303 F. Supp. at 384-85.

See also United States v. George, 447 F.2d 508 (7th Cir. 1973); **United States v. Proctor & Gamble Co.**, 47 F. Supp. 676 (D. Mass. 1942). In each of these cases, the court upheld the mail fraud indictment on the ground that the mails had been used in a scheme to defraud a corporation of the "honest and faithful services" of one or more employees. In addition,

cf. Alexander v. United States, 95 F.2d 873 (8th Cir. 1938) (defendants convicted for using mails in scheme "to defraud the public" by issuing false medical diplomas and licenses to persons without medical education). These cases serve as persuasive authority for the proposition that in a prosecution for use of the mails to further and execute a vote fraud scheme the indictment states an offense even though it does not contain allegations that anyone was defrauded of any property or money.

Nevertheless, the appellants argue that the application of the mail fraud statute to the facts of this case will result in a "policing" of state election procedure, and that Congress has never explicitly authorized such widespread intervention into state affairs. The appellants' argument misinterprets the purpose of the mail fraud legislation. The focus of the statute is upon the misuse of the Postal Service, not the regulation of state affairs, and Congress clearly has the authority to regulate such misuse of the mails. **See Badders v. United States,** 240 U.S. 391, 393 (1916): "The overt act of putting a letter into the post office of the United States is a matter that Congress may regulate * * * Whatever the limits to its power, it may forbid any such acts done in furtherance of a scheme it regards as contrary to public policy, whether it can forbid the scheme or not." The purpose of 18 U.S.C. § 1341 is to prevent the Postal Service from being used to carry out fraudulent schemes, regardless of what is the exact nature of the scheme and regardless of whether it happens to be forbidden by state law. **See Parr v. United States,** 363 U.S. 370, 389, 390 (1960); **cf. Brady v. United States,** 24 F.2d 405, 407 (8th Cir. 1928). "Congress definitely intends that the misuse of the mails shall be controlled even though it be its policy to leave the control of elections to the several states." **United States v. Classic,** *supra* at 458.

The appellants' argument presents no justification for refusing to apply the mail fraud statutes to the facts of this case.

The prosecution of appellants in federal court for mail fraud does not interfere with the state's enforcement of its election laws. There are no grounds for dismissing the indictment under the principles of comity or the abstension doctrine or under any other principle of federalism.

Finally, appellant Michael McCoy urges that there is insufficient evidence to support his conviction. We disagree. There was adequate evidence to support a finding beyond reasonable doubt that McCoy willingly and knowingly participated in the illegal absentee ballot operation. McCoy admitted that he falsely completed absentee ballot applications, and each application advised the applicant of the illegality of false statements and notified the applicant that the ballot would be sent by mail to him.

In sum, we hold the indictment alleged a federal offense and the evidence proved every element thereof.

Affirmed.

Ross, Circuit Judge, concurring.

I reluctantly concur. The law, as capably expressed by Judge Matthes, leaves us no other alternative.

However, I cannot believe that it was the original intent of Congress that the Federal Government should take over the prosecution of every state crime involving fraud just because the mails have been used in furtherance of that crime. The facts in this case show that this election fraud was purely a state matter. It should have been prosecuted in state court. The Assistant United States Attorney conceded in oral argument that the case was not the type of mail fraud case covered by written instructions contained in the United States Attorneys' manual. In spite of this, the decision was made by the United States Attorney to prosecute the case without asking or receiving the approval of the Department of Justice. In so doing, he relieved the state of its duty to police the violation of its local election laws and helped create a precedent which will encourage the same sort of unwarranted federal preemption in the future.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit

APPENDIX B

United States District Court
Eastern District of Missouri
Eastern Division

United States of America, Plaintiff, vs. Isaac States, Robert Morgan, Dennis Jones, Michael McCoy, Linda Dotson, Roy Armstrong, Dorothy Darris, James O. Fowler, Arthur Thomas, Defendants.	Cause No. 72 Cr 322(3).

Memorandum

On February 5, 1973 the court denied separate motions of all defendants to dismiss the indictment for failure to state an offense against the United States. This Memorandum sets forth the basis for that order.

The defendants stand indicted of mail fraud in violation of 18 U.S.C. §§ 1341 and 1342 and conspiracy in violation of 18 U.S.C. § 371. The indictment charges that the defendants devised a scheme to defraud the voters and residents of the third and nineteenth wards of the City of St. Louis and the Board of Election Commissioners of the City of St. Louis by the use of fraudulent voter registrations and applications for absentee ballots. It is alleged that the purpose of the scheme to defraud was to influence the outcome of the election of the Republican Committeeman for the nineteenth ward and the Democratic Committeeman for the third ward "for the purpose of securing and controlling said political offices and the political influence and

financial benefits of said offices * * *" It is further alleged that as part of the scheme to defraud, the defendants submitted false and fraudulent voter registration affidavits bearing the names of false and fictitious persons with false addresses and caused the St. Louis Board of Election Commissioners to place absentee ballots for the fictitious persons in an authorized depository for mail matter.

Count One charges a conspiracy to commit an offense in violation of 18 U.S.C. § 1341 and 18 U.S.C. § 1342, which is an offense under 18 U.S.C. § 371. The remaining 136 counts charge substantive violations of either § 1341 or § 1342. The conspiracy count does not rely upon the clause in § 371 which makes it an offense to conspire to defraud the United States. Thus, all of the counts of the indictment have one common and essential element with respect to the offense alleged in each count: the devising of a scheme or artifice to defraud. If the scheme alleged—to cause false and fraudulent absentee ballots to be counted in a primary election in order to control the offices of two ward committeemen—is not a "scheme or artifice to defraud" within the meaning of 18 U.S.C. § 1341, then the government will have failed to state an offense under any of the counts of the indictment, and the indictment must be dismissed.

As was said by Justice Holmes long ago:

> "The overt act of putting a letter into the postoffice of the United States is a matter that Congress may regulate. Ex Parte Jackson, 96 U.S. 727. . . . Whatever the limits to the power, it may forbid any such acts done in furtherance of a scheme that it regards as contrary to public policy, whether it can forbid the scheme or not. [citations omitted]."

Badders v. United States, 240 U.S. 393 (1916).

Title 18 U.S.C. §1341 provides:

> "§ 1341. Frauds and swindles
>
> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting to do so, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined no more than $1,000 or imprisoned not more than five years, or both."

The burden of defendants' motion is that the indictment does not state a violation of § 1341 because there is no allegation that anyone was defrauded of money or property. The principal case cited in support of defendants' argument is **United States v. Randle,** 39 F. Supp. 759 (W.D. La. 1941), which in turn relies on **United States v. Gradwell,** 243 U.S. 476 (1917); **United States v. Bathgate,** 246 U.S. 223 (1918), and **Hammerschmidt v. United States,** 265 U.S. 182 (1924). In **Randle,** it was charged that the defendants in violation of 18 U.S.C. § 338, the forerunner of 18 U.S.C. § 1341, devised a scheme to defraud by making false election returns in a state primary, spoiling and incorrectly counting ballots and using the mails as part of that scheme. The court sustained a demurrer to the indictment, holding:

"[I]t must be shown by the alleged scheme that the persons to be defrauded were or could have been deprived of moneys or property of some value other than mere civil or political rights. See Hammerschmidt v. United States, 265 U.S. 182. . . .

* * * * * * *

"The sovereign and public generally have no property right in the selection of officers of which it or they may be deprived by misconduct, even in general elections. United States v. Gradwell, 243 U.S. 476 . . .; United States v. Bathgate, 246 U.S. 220. . . ."

With due respect, the decisions relied upon do not support the result in **Randle,** nor do they support the contention of defendants in this case. Both **Gradwell** and **Bathgate** involved as a basis for federal jurisdiction the bribery of voters in state elections. **Gradwell** held that such conspiracies were not conspiracies to defraud the United States under the general conspiracy offense charged. Both **Gradwell** and **Bathgate** held that Section 19 of the criminal code, which applied to certain conspiracies against the elective franchise, did not apply to bribery of voters. Neither case dealt with the applicability of the mail fraud statutes. **Hammerschmidt,** also cited in **Randle,** dealt with an alleged violation of the Selective Service Act. In distinguishing a mail fraud case, **Horman v. United States,** 116 F. 350, the Supreme Court said that the offense under the mail fraud statute should be confined to "pecuniary or property injury inflicted by a scheme to use the mails for the purpose." In relation to the instant case, this statement must be regarded as dictum, for it was not required to, nor did it come to grips with the **alternative** mail fraud schemes proscribed under the statute: "and scheme or artifice to defraud, **or** for obtaining money or property by means of false or fraudulent pretenses * * *," 18 U.S.C. § 1341 (emphasis supplied). The disjunctive character of the clause has long been recognized. **See United States v. Young,** 232 U.S. 155 (1914).

Consistent with the construction of the word "defraud", as used in § 1341, as not necessarily limited to schemes to obtain money or property, is the language of the court in **United States v. Proctor & Gamble Co.:**

> "Broadly, 'fraud' has been defined as 'any artifice whereby he who practices it gains, or attempts to gain, some undue advantage to himself, or to work some wrong or do some injury to another, by means of a representation which he knows to be false, or of an act which he knows to be against right or in violation of some positive duty.' Commonwealth v. Tuckerman, 10 Gray, Mass., 173, 203, cited with approval in Commonwealth v. O'Brien, 305 Mass. 393, 397, 398, 26 N.E.2d 235. But, as was stated in Foshay v. United States, 8 Cir., 68 F.2d 205, 211: 'To try to delimit "fraud" by definition would tend to reward subtle and ingenious circumvention and is not done.'"
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> 47 F. Supp. 676, 678 (D. Mass. 1942).

See also the language of the court in **Blachly v. United States:**

> "The crime of mail fraud is broad in scope. . . . The fraudulent aspect of the scheme to 'defraud' is measured by a nontechnical standard. . . . [The] [l]aw puts its imprimatur on the accepted moral standards and condemns conduct which fails to match the 'reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society.' . . . This is indeed broad. For as Judge Holmes once observed, '[t]he law does not define fraud; it needs no definition; it is as old as falsehood and as versable as human ingenuity.'"
>
> 380 F.2d 665, 671 (5th Cir. 1967); and **see Abbott v. United States,** 239 F.2d 310, 314 (5th Cir. 1956).

It may be argued that the scheme or artifice to defraud referred to in § 1341 is at least limited to situations where one is deprived of something of value, albeit not capable of translation into terms of money. Under our form of government, however, it could hardly be contended that the right to have one's vote counted, undiluted by fraudulent absentee ballots, is without value. Cf. **United States v. Saylor,** 322 U.S. 385 (1944); **United States v. Classic,** 313 U.S. 299 (1941).

At least one other court has reached the same conclusion. In **United States v. Classic,** 35 F. Supp. 457 (E.D. La. 1940), the court overruled a demurrer to an indictment under the mail fraud statute for a scheme to defraud in connection with a primary election. The court stated:

> "The mail fraud statute denounces **the use of the mails,** in the actual, or attempted, execution of **any** devised scheme or artifice to defraud, **or** for obtaining money or property by means of false or fraudulent pretenses, representations or promises, and the counts 5 and 6 of the indictment herein properly charge the statute's violation."
>
> * * * * * * *
>
> "The unlawful act of the [primary election] commissioners in the alleged devising of the scheme to defraud and in thereafter using the mails in the execution thereof is the subject of congressional regulation."
> *Id.* at 458.[1]
>
> "Congress definitely intends that the misuse of the mails shall be controlled even though it be its policy to leave the control of elections to the several States."

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[1] In **United States v. Classic,** 313 U.S. 299 (1941), the Supreme Court held that the lower court had erred in sustaining a demurrer to counts 1-4 of an indictment which charged violations of §§ 19 and 20 of the Criminal Code, 18 U.S.C. §§ 51 and 52. **United States v. Classic,** 35 F. Supp. 457 (E.D. La. 1940), involved counts 5 and 6 of that same indictment and charged violations of the mail fraud statute then in force. (18 U.S.C. § 338).

Any argument to the effect that these defendants should not be prosecuted under the mail fraud statute, 18 U.S.C. § 1341, because Congress has not clearly shown that it intends to regulate the conduct of elections for Committeemen is simply irrelevant.

In this court's opinion, the conclusion of the District Court in **United States v. Classic,** supra, and the authorities relied upon therein, in contrast with **United States v. Randle,** correctly anticipate the view of the Supreme Court with respect to applicability of federal mail fraud to ballot stuffing schemes in state elections.[2]

A scheme to obtain and vote absentee ballots in Missouri by means of false applications necessarily contemplates the use of the mails as an integral part of that scheme, because ballots which are not voted at the Board of Election Commissioners' office must be sent to the prospective voter by certified mail. § 112.030 V.A.M.S. Once the ballots were delivered into the hands of those who are charged with fraudulently obtaining them, they could be completed en masse without the risks attendant upon personal appearances at the Board. Use of the mails, under the scheme charged in the indictment, was thus intended to carry out an essential step in the execution of the scheme.

The essential elements of the offense under 18 U.S.C. § 1341 may be easily gleaned from the statute: the act of having de-

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[2] In so holding, it is not necessary to anticipate a change in the Supreme Court's distinction between **bribery** and **ballot stuffing.** See **United States v. Saylor,** supra, at 389. While care should be taken not to extend the mail fraud statutes beyond the limits intended by Congress, see **U.S. v. Kelem,** 416 F.2d 346 (9th Cir. 1969), cert. denied 397 U.S. 952, it cannot be said that Congress intended to exclude from prosecution the willful use of the mails to accomplish a scheme to defraud voters by dilution of their franchise. It is the misuse of the mails which Congress has chosen to regulate, and the scheme to defraud as alleged in the indictment is an artifice or scheme to defraud within the meaning of the statute (18 U.S.C. § 1341).

vised or intended to devise a scheme or artifice to defraud; the act of placing or causing to be placed in an authorized depository for mail matter a letter intended to be sent or delivered by the post office; and the willful use of the mails with the specific intent to carry out some essential step in the execution of the scheme or artifice to defraud. See Devitt & Blackmar, Federal Jury Practice and Instructions, § 40.05, at 506-07. The court concludes that the indictment properly charges a scheme or artifice to defraud as those terms are used in 18 U.S.C. § 1341, and also charges the other essential elements of the offense in sufficient detail.

Dated: February 12, 1973.

William H. Webster
United States District Judge

APPENDIX C

Judgment

United States Court of Appeals
For the Eighth Circuit

No. 73-1253 September Term, 1973

The United States,
Appellee,

vs.

Isaac States,
Appellant.

Appeal from the United States District Court for the Eastern District of Missouri.

This Cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

December 5, 1973

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1021

ISAAC STATES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 488 F.2d 761. The opinion of the district court (Pet. App. B) is reported at 362 F. Supp. 1293.

JURISDICTION

The judgment of the court of appeals was entered on December 5, 1973. The petition for a writ of certiorari was filed on December 29, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the federal mail fraud statute, 18 U.S.C. 1341, applies to the use of the mails to distribute false absentee ballots in an election fraud scheme designed to assure a candidate's nomination in a primary election.

STATUTE INVOLVED

The federal mail fraud statute, 18 U.S.C. 1341, provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

STATEMENT

Petitioner was charged in 42 counts of a multiple count indictment[1] with conspiracy to commit and with the commission of mail fraud (18 U.S.C. 371, 1341, and 1342). After a jury-waived trial in the United States District Court for the Eastern District of Missouri, he was convicted on all counts and sentenced to five years' imprisonment. The court of appeals affirmed in a comprehensive opinion (Pet. App. A).

The facts are not in dispute and are outlined in the opinion of the court of appeals. Petitioner, who was a candidate in the 1972 primary for the office of Democratic Committeeman for the third ward in St. Louis, and one Robert Morgan, a candidate for Republican Committeeman from the nineteenth ward, devised a scheme regarding their respective primary elections. Through an acquaintance on the city election board, petitioner and Morgan were able to register a large number of fictitious names as eligible voters for the impending election. At stake in the primary election were both local and federal offices. Just prior to the election, petitioner and Morgan requested that absentee ballots be sent, in the names of the nonexistent voters, to addresses accessible to themselves. By receiving and returning such ballots through the mails, they intended to vote repetitively for themselves. As a result of their requests, 21

[1] Two of petitioner's co-defendants pleaded guilty and four others were acquitted.

ballots were actually delivered by the postal service and retrieved by petitioner and Morgan, while others were sent but not actually delivered, because the route carriers recognized that the persons identified on the envelopes did not live at the addresses indicated. Subsequent action by the Postal Service frustrated the completion of the scheme, and the instant prosecution followed.

ARGUMENT

Petitioner contends that his indictment and conviction under the mail fraud statute is invalid because there was no showing of an intent to defraud anyone of tangible property rights.[2] Petitioner misconceives the proper reach of the mail fraud statute. Its underlying purpose is not to prevent one or more specific types of fraud, but rather to insure the basic integrity of the nation's postal system. As this Court noted in *Parr* v. *United States*, 363 U.S. 370, 389:

> In exercise of that power, Congress enacted § 1341 forbidding and making criminal any use of the mails "for the purpose of executing [a] scheme" to defraud or to obtain money

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[2] While petitioner was also charged with a conspiracy under 18 U.S.C. 371—which he admits would normally encompass the conduct involved in the instant case—the only portion of Section 371 here involved, as the court of appeals pointed out, is that which makes unlawful any conspiracy to "commit any offense against the United States," and accordingly, if there is no offense under 18 U.S.C. 1341, the indictment would be fatally defective (Pet. A-2, n.2).

> by false representations—leaving generally the matter of what conduct may constitute such a scheme for determination under other laws. Its purpose was "to prevent the post office from being used to carry [such schemes] into effect . . . ." *Durland* v. *United States*, 161 U.S. 306, 314.

See also *United States* v. *Edwards*, 458 F.2d 875, 880-881 (C.A. 5); *United States* v. *Cashin*, 281 F.2d 669, 674 (C.A. 2). The mail fraud statutes are thus purposefully broad in order to assure that all illicit uses of the mails in whatever context, including the type that occurred here, can be reached by the federal government. The postal service was here used in a scheme to defraud voters of their right to an honest election. The gravamen of the offense consists of the use of the federal mails in executing a fraudulent scheme, and, whether the mails are used for a private fraud or a public fraud, this federal service is equally abused. Accordingly, such abuse is equally punishable to assure the integrity of the postal service.

While prosecutions for mail fraud do generally involve schemes to defraud the public of money or other tangible property, petitioner errs in contending that Section 1341 is applicable solely to schemes having pecuniary objectives. In *United States* v. *George*, 477 F.2d 508 (C.A. 7), certiorari denied, 414 U.S. 827, the defendant, a purchasing agent, received kickbacks from suppliers of his employer. The court noted that the employer had in fact not paid any higher than the normal price for the goods purchased by the agent in anticipation of the kickback. None-

theless, a scheme to defraud was recognized because the employer had been defrauded of the defendant employee's "honest and faithful services." 477 F.2d at 514. Similarly, in *United States* v. *Faser*, 303 F. Supp. 380 (E.D. La.), the defendant was convicted of mail fraud for a scheme to deprive the State of the honest and faithful performance of its officers where public officials had been induced to place state funds in certain banks, rather than others, even though the State's deposits were not in jeopardy. See also *Shushan* v. *United States*, 117 F.2d 110 (C.A. 5), and *Bradford* v. *United States*, 129 F.2d 274 (C.A. 5), where the mail fraud schemes involved attempts to deprive the public, through bribery, of the honest and diligent efforts of their public officials. Finally, and directly on point, is *United States* v. *Classic*, 35 F. Supp. 457 (E.D. La.), involving a mail fraud scheme by primary election commissioners to alter the outcome of an election. In upholding prosecution under the predecessor to the current mail fraud statute (18 U.S.C. (1940 ed.) 338), the court noted that "[t]he mail fraud statute denounces *the use of the mails*, in the actual, or attempted, execution of *any* devised scheme or artifice to defraud * * *" (35 F. Supp. at 458; emphasis in original).[8]

[8] Petitioner cites *United States* v. *Randle*, 39 F. Supp. 759 (W.D. La.), as standing for the opposite conclusion with respect to mail fraud prosecutions of election irregularities. However, *Randle*, decided in 1941, was based upon a subsequently discredited notion that "[t]he sovereign and public generally have no property right in the selection of officers of which it or they may be deprived by misconduct, even in

Petitioner seeks to bolster his position by suggesting that, as a matter of policy, Section 1341 should not be interpreted to recognize federal criminal jurisdiction over state elections and other local matters. (Pet. 9-10). Initially, we observe that petitioner's characterization of the election as a local one is inaccurate. While he and his co-conspirators were seeking local party office, the election for which ballots were fraudulently obtained was a general primary in which congressional as well as local candidates were seeking office, and petitioner, if elected party committeeman, would have had a role in federal as well as state party matters. Aside from these facts, however, the legitimacy of a prosecution under Section 1341 for the fraudulent use of the mails for a scheme that violates only state laws is well established:

> The fact that a scheme may violate state laws does not exclude it from the proscriptions of the federal mail fraud statute, for Congress "may forbid any . . . [mailings] . . . in furtherance of

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general elections." 39 F. Supp. at 760. Since *Randle*, this Court has frequently emphasized the substantiality of the right involved in the enjoyment of casting a ballot not diluted through the addition of other unlawful ballots. See *United States* v. *Saylor*, 322 U.S. 385, 387-388; *United States* v. *Classic*, 313 U.S. 299, 325. *Randle* also relied upon *United States* v. *Gradwell*, 243 U.S. 476, and *United States* v. *Bathgate*, 246 U.S. 220, cited by petitioner. In those two cases, attempts to alter elections by bribery of voters, rather than by diluting votes or preventing citizens from voting, were not deemed indictable offenses under federal law. The subsequent *Saylor* case, however, questioned this distinction and strictly limited the two cases to their narrow factual context. 322 U.S. at 388-389.

> a scheme that it regards as contrary to public policy, whether it can forbid the scheme or not." [*Parr, supra*, 363 U.S. at 389, quoting *Badders* v. *United States*, 240 U.S. 391, 393.]

Petitioner contends (Pet. 13-15) that federal election and civil rights laws do not extend to state elections and thus indicate an intent of Congress to abstain from regulating the conduct of state elections. Regardless of the reach of such statutes (see *Anderson* v. *United States*, No. 73-346, argued March 19, 1974), the mail fraud statute, as we have shown, reaches all uses of the mail to defraud. Nor is this Court's opinion in *United States* v. *Maze*, No. 72-1168, decided January 8, 1974, to the contrary. The decision in *Maze* was based upon the conclusion that the fraud was complete upon the defendant's use of the credit card and that the subsequent use of the mails by a creditor to request payment from a bank was not, in the terminology of Section 1341, a use of the mails "for the purpose of executing such scheme or artifice." In petitioner's case, the use of the mails occurred various times during the course of the scheme to defraud the voters and was essential to the plan.[4]

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[4] Petitioner, inconsistently, also seeks to impute an improper motive to the United States Attorney by suggesting that the instant prosecution was brought under the mail fraud statutes rather than more specific civil rights statutes because the U.S. Attorney feared the Department of Justice would not approve a request for a civil rights prosecution (Pet. 9). We are informed by the U. S. Attorney that this suggestion is based on a dialogue during oral argument between Judge Ross of the court of appeals below and

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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Mr. David Harlan, the government attorney who prosecuted the case at trial and on appeal. The latter indicated, on being queried by Judge Ross, that the U.S. Attorney's manual does request that prosecutions for voter fraud under 18 U.S.C. 241 be discussed with the Department of Justice in Washington before being pursued. (See Pet. App. A-13.) Such consultation is often time consuming; as the November elections were rapidly approaching and the false names introduced by petitioner prior to the primary election were still on the voters' list, the U.S. Attorney's office decided to prosecute under 18 U.S.C. 1341, as the case involved mail fraud as well as election fraud. The Department of Justice was informed of the pending prosecution and, had it concluded that any policy was being contravened by the prosecution under Section 1341, the case would have been dismissed. No objections to the U.S. Attorney's actions were made by the Department.

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